No. 82-716

Office - Supreme Court, U.S.
FILED
NOV 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE EL PASO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

BRIEF OF AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN A. MYLER
(Counsel of Record)
THOMAS C. MARTIN
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Of Counsel:

Charles J. Monahan
Mark L. Evans
Miller & Chevalier, Chartered
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 626-5600

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. THIS CASE PRESENTS AN IMPORTANT QUESTION ON HOW TO RESOLVE THE EXISTING CONFLICT BETWEEN FEDERAL REVENUE COLLECTIONS AND FEDERAL SECURITIES REQUIREMENTS	3
II. THIS CASE DIRECTLY CONFLICTS WITH THE HOLDING OF THE SECOND CIRCUIT IN *ARTHUR YOUNG & CO*	4
III. THIS CASE PRESENTS A FUNDAMENTAL AND VITAL QUESTION OF FEDERAL STATUTORY CONSTRUCTION INVOLVING THE TYPE OF INFORMATION THAT MAY BE SUMMONED AS RELEVANT TO THE DETERMINATION OF TAX LIABILITY	5
IV. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

United States v. *Arthur Young & Co.*, 677 F.2d 211 (2nd Cir. 1982), *petition for cert. filed*, No. 82-687 (October 20, 1982) 4

United States v. *Coopers & Lybrand*, 556 F.2d 615 (10th Cir. 1977) 5

Statutes

15 U.S.C. §78*l* 3

26 U.S.C. §7602 2,3,5,6

No. 82-716

IN THE

Supreme Court of the United States

October Term, 1982

THE EL PASO COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL*.,

Respondents.

BRIEF OF AMERICAN GAS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The American Gas Association (A.G.A.) submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by The El Paso Company. The A.G.A. supports this Court's review of all of the issues presented by the petition.[1]

INTEREST OF THE *AMICUS CURIAE*

The A.G.A. is a trade association representing the interests of its approximately 250 member companies involved in the distribution and transmission of natural gas throughout the

[1] Written permission from the parties to this litigation to file this brief as *amicus curiae* has been obtained and has been filed with the Clerk of this Court.

50 states. The El Paso Company, the petitioner in this case, is a holding company of several corporations, one of which, The El Paso Natural Gas Company, is a member of the A.G.A.

A divided panel of the United States Court of Appeals for the Fifth Circuit in this case affirmed the judgment of the United States District Court enforcing an Internal Revenue Service summons issued to The El Paso Company. The court held, in pertinent part, that: (1) the taxpayer's tax pool analysis and supporting memoranda summoned by the Service were "relevant," within the meaning of 26 U.S.C. §7602, to determining the correctness of certain of El Paso's tax returns, (2) the tax pool analysis and supporting memoranda were protected neither by the attorney-client privilege nor by the work-product doctrine, and (3) the public policies reflected in federal securities laws did not require denial of enforcement of the summons.

The Fifth Circuit's decision is of vital importance to, and will directly affect, all publicly held corporations. The vast majority of A.G.A. member companies, like The El Paso Company, are publicly held. Because of the unusual and widespread importance of the issues decided by the Fifth Circuit, the A.G.A. is filing this *amicus curiae* brief in support of The El Paso Company's petition.

ARGUMENT

The petition for writ of certiorari filed by The El Paso Company presents genuinely important issues requiring this Court's resolution. The issues are central to the fair and consistent enforcement of both the revenue and securities laws, the implementation of financial disclosure requirements, and the interpretation of the attorney-client and accountant-client relationships. The Fifth Circuit has held that it is lawful to require a public corporate taxpayer to provide the Internal Revenue Service with the corporation's own "tax pool analysis". The tax pool analysis reflects the taxpayer's estimate of ultimate tax liability for a taxable year. It includes the identification of issues which might be subject to challenge

by the Internal Revenue Service, discussion of the merits of those issues, and estimated dollar amounts at which the company would settle disputed positions at the administrative level of the Service. The tax pool analysis is developed by the taxpayer alone or with the assistance of independent auditors.

Through its decision, the Fifth Circuit has erroneously construed 26 U.S.C. §7602 as embodying a Congressional judgment that society's interest in the collection of revenues takes priority over other interests of substantial magnitude and having long-standing recognition – namely, the need for full and candid corporate financial disclosure and the need to preserve attorney-client confidences. This Court's review is required because the Courts of Appeals are now irreconcilably divided over the extent to which the statutory responsibilities of the Internal Revenue Service must override these other important interests.[2]

I. THIS CASE PRESENTS AN IMPORTANT QUESTION ON HOW TO RESOLVE THE EXISTING CONFLICT BETWEEN FEDERAL REVENUE COLLECTIONS AND FEDERAL SECURITIES REQUIREMENTS

A clear conflict between federal revenue collections and the maintenance of a fair and informed securities market has been engendered by the Internal Revenue Service's summoning of tax pool analyses.[3] Tax pool analyses are used by corporations in fulfilling the requirement of the securities laws that public companies periodically file audited financial statements disclosing material and contingent tax liabilities. See, *e.g.*, 15 U.S.C. §78*l*. Complete candor in the preparation of such analyses is necessary to implement properly the policy of full financial disclosure inherent in the federal securities laws.[4]

---

[2] See Petition for a Writ of Certiorari at 10 for a complete and concise summary of the issues on which, and the judgments by which, the Courts of Appeals are split.

[3] *Id.* at 18-21.

[4] See comments of current Internal Revenue Commissioner Roscoe Egger and former Commissioner Mortimer Caplin, Petition at 20.

To say that the Fifth Circuit's decision may discourage maximum disclosure of contingent tax liabilities is not, as the majority below incorrectly believed, to "assum[e] that corporations will dishonor their legal obligations" or "[e]vade their responsibilities under the securities laws. . . ." Pet. App. 27a. This is not an all-or-nothing issue. A corporate taxpayer may fulfill its legal obligations with respect to a tax pool analysis within a broad zone of reasonableness. While there is no reason to believe that corporations will disregard those obligations, the decision below may well provide a disincentive for companies to make maximum disclosure within the permissible range, since that may risk exposing to the Internal Revenue Service more tax analyses than is necessary.

Insofar as the effective operation of the securities markets envisioned in passage of the securities laws is hampered by specific techniques of revenue collection, such as the Service's use of the summons, this Court's review of such techniques is necessary.

II. THIS CASE DIRECTLY CONFLICTS WITH THE HOLDING OF THE SECOND CIRCUIT IN *ARTHUR YOUNG & CO.*

The Second Circuit's recent recognition of privileged status for an accountant's tax pool analysis in *United States* v. *Arthur Young & Co.*, 677 F.2d 211 (1982), *petition for cert. filed*, No. 82-687 (Oct. 20, 1982), is in direct conflict with the Fifth Circuit's decision. The Fifth Circuit inexplicably read the *Young* privilege as existing only when the document concerned is in the possession of independent auditors. Pet. App. 12a, n.7. If the tax pool analysis privilege exists, there is no valid reason for making its effectiveness contingent upon physical possession by an outside auditor. Indeed, the traditional treatment of privilege suggests the opposite. It would be anomalous if the Service could not obtain a tax pool analysis from a taxpayer's outside auditors but could obtain the same analysis from the taxpayer itself. That anomaly would undoubtedly lead to a proliferation of litigation in other circuits absent a decision by this Court.

The existence of the accountant work-product privilege established by the Second Circuit, and its applicability to situations where the Service seeks discovery directly from the taxpayer, both matters of inter-circuit conflict, are therefore questions meriting this Court's review.

III. THIS CASE PRESENTS A FUNDAMENTAL AND VITAL QUESTION OF FEDERAL STATUTORY CONSTRUCTION INVOLVING THE TYPE OF INFORMATION THAT MAY BE SUMMONED AS RELEVANT TO THE DETERMINATION OF TAX LIABILITY

Consideration of the Fifth Circuit's decision involving the relevance of The El Paso Company's tax pool analysis should properly begin with construction of the statute itself. Title 26 U.S.C. §7602 authorizes examination of "any books, papers, records, or other data which may be relevant" to determining the correctness of the tax return involved. The Fifth Circuit's majority found it difficult "to imagine a document more likely to shed light on the correctness of those aspects of a return that harbor doubts than the tax pool analysis." Pet. App. 12a. That view is founded, however, on the majority's notion that "[d]ocuments that focus and concentrate the Service's energy on questionable positions in the return . . . are highly relevant." *Id.*

The majority's analysis, which conflicts with that of the Tenth Circuit in *United States* v. *Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977), erroneously ignores the critical distinction, articulated in Judge Garwood's incisive dissent, between documents that contain "*factual* information" respecting a taxpayer's tax liability or the correctness of its return, and documents that would merely "facilitat[e] or mak[e] more efficient the process of examination." Pet. App. 33a, 32a. As Judge Garwood's dissenting opinion persuasively demonstrates, there is substantial reason to believe that 26 U.S.C. §7602 authorizes the discovery of factual

information but not of the taxpayer's post-return private thought processes, theories, and opinions.[5]

There is little question that the Internal Revenue Service is entitled to all information and data necessary to determine the correctness of the taxpayer's return. Without such information, the Service cannot properly perform its responsibilities. On the other hand, it is difficult to believe that Congress intended to go so far as to give the Service access to the professional judgments of tax lawyers and accountants, which are paid for by the taxpayer, and which form an integral part of many tax pool analyses. Since the beginning of our revenue laws, this type of information has never been regarded as necessary to establish the correctness of a taxpayer's liability, and the Service's mission has not suffered without it. Nor should this type of information be necessary in the future. A tax pool analysis is not "relevant" as the term is used in 26 U.S.C. §7602, because it is not needed to determine the correctness of liability on the tax return.

The resolution of the split among the Courts of Appeals regarding the appropriate construction of 26 U.S.C. §7602 is available only through this Court's review.

IV. THIS CASE RAISES IMPORTANT QUESTIONS CONCERNING THE APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE

As recognized by the Fifth Circuit, in order to comply with the securities laws, companies such as El Paso must "prepare in-house, or have prepared by outside auditors, an analysis of their contingent tax liabilities." Pet. App. 5a. In El Paso's case, the tax pool analysis containing its contingent tax liabilities was prepared at the direction of and in consultation with their in-house lawyers. The Fifth Circuit held that El Paso's

---

[5] Judge Garwood points out that former Internal Revenue Commissioner Mortimer Caplin has observed that after reflection on the word "data" as contained in section 7602(a), "[w]hat comes to mind in the use of that term are items such as books, records, and other factual materials – not opinions, projections, conjectures and other thought processes." Pet. App. 35a.

discussions of limited portions of the tax pool analysis with its outside auditors destroys both any expectation of confidentiality regarding the entire contents of the analysis and any right to claim attorney-client privilege. To interpret the federal securities laws as imposing responsibilities which, when diligently carried out, destroy the oldest of the privileges for confidential communications known to the common law is a matter of most serious consequence which should be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN A. MYLER
(Counsel of Record)
THOMAS C. MARTIN
American Gas Association
1515 Wilson Boulevard
Arlington, Virginia 22209
(703) 841-8460

Of Counsel:

Charles J. Monahan
Mark L. Evans
Miller & Chevalier, Chartered
1700 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 626-5600

(THIS PAGE INTENTIONALLY LEFT BLANK)